SECTION 10

DIGESTS

Average Weekly Wage in General

Introduction

The Board affirms the administrative law judge's average weekly wage determination, holding that it would be the same whether claimant's condition is considered to be an occupational disease or a traumatic injury. Claimant's date of awareness under Section 10(i) is the same date as the date of the last aggravation. *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

Where claimant was injured in the course of his part-time employment as a furniture mover, but his injury did not affect his ability to earn wages in his full-time job as an insurance claims supervisor, the Board held that the wages from the job which was not affected by the injury should be excluded from the calculation of average weekly wage. The Board reasoned that holding employer responsible for this higher level of compensation when claimant is fully able to earn wages at his full-time job is unfair and contrary to the purposes of the Act. Thus, claimant's compensation rate for his scheduled injury was based solely on his average weekly wage in the part-time job in which he was injured. Harper v. Office Movers/E.I. Kane, Inc., 19 BRBS 128 (1986).

The Board holds that the administrative law judge erred in basing claimant's award for disability due to an 1984 injury on claimant's 1980 earnings. Where an employee sustains an injury which aggravates a prior condition, his average weekly wage for the resulting disability is based on his earnings at the time of the aggravation. His average weekly wage should be based on the wage-earning capacity remaining after the disability due to the first injury he sustained while working for the first employer. The Board remands for the administrative law judge to determine if claimant is entitled to concurrent awards: a permanent partial disability award based on the loss in wage-earning capacity caused by the first injury payable by the first employer, and a temporary total disability award based on an average weekly wage reflective of claimant's already reduced wage-earning capacity prior to the second injury payable by the second employer. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

The Board remands the case where the administrative law judge awarded claimant permanent total disability for a 1986 injury at the average weekly wage he found for a 1988 injury. There can be only one average weekly wage for a given injury and all payments of compensation must be based on that figure. Moreover, post-injury events generally are irrelevant to average weekly wage. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

Where the Board modifies the decision of the administrative law judge, holding that, as the date of onset of disability is May 6, 1983, the relevant 52 week period is from May 6, 1982 to May 6, 1983, rather than claimant's average earnings in the prior calendar year, 1982. Thus, the Board remands the case for the administrative law judge to calculate claimant's average weekly wage for this 52 week period, pursuant to Section 10(c) and 10(d)(2)(A). *Alexander v. Triple A Machine Shop,* 32 BRBS 40 (1998), *rev'd on other grounds sub nom. Alexander v. Director, OWCP,* 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

The Ninth Circuit held that where the disability attributable to claimant's traumatic injury did not occur until several years later, claimant's average weekly wage should be calculated as of the time the disability became manifest, rather than at the time of the accident. To hold otherwise would discourage claimants from attempting to return to work after the accident, and this holding is consistent with the law as developed in occupational disease cases. *Johnson v. Director, OWCP,* 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied,* 499 U.S. 959 (1991).

In a case where claimant suffered a work-related injury but returned to work for the same employer after a period of disability and later became totally disabled, if claimant's resulting condition is the result of aggravations (*i.e.*, new injuries) after he returned to work, his average weekly wage for disability due to the aggravations must be computed at that time. This would result in a computation consistent with *Johnson,* 911 F.2d 247, 24 BRBS 3 (CRT)(9th Cir. 1990), *cert. denied,* 499 U.S. 959 (1991). If, however, claimant's ultimate disability is the result of the initial work injury, the Board holds that *Johnson* is distinguishable in that in this case employer voluntarily paid compensation for the initial period of disability, and there can be only one average weekly wage for a given injury. Moreover, claimant's earning decreased between 1985 and 1987, and use of the 1987 average weekly wage would penalize claimant for attempting to return to work, contrary to the concern expressed in *Johnson*. The case is remanded for the administrative law judge to determine whether claimant's disability is due to the 1985 injury or to subsequent aggravations, and to determine an average weekly wage consistent with the above. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

The accident that caused claimant's disability in 1985 occurred in 1981. The Board affirms the administrative law judge's use of claimant's wages in 1985 to determine his average weekly wage, rather than his wages in 1981. The Board holds that the date of disability rather than the date the accident occurs may be the appropriate date of "injury" for the purposes of average weekly wage inasmuch as "injury" has been defined as awareness of an impairment in wage-earning capacity due to the accident. This result is consistent with the Ninth Circuit's decision in *Johnson*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990). *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

Claimant's back condition, degenerative facet disease, resulting from a fall from a ship ladder, was a traumatic injury, not an occupational disease, and compensation benefits should be based on claimant's average weekly wage at the time of the 1987 injury, *i.e.*, the date the incident occurred, rather than the higher average weekly wage at the time the condition was diagnosed in 1992. Degenerative facet disease resulted from traumatic physical impact, not exposure to external, environmentally hazardous conditions of employment. The Fifth Circuit expresses its disagreement with the Ninth Circuit's application of concept of latent trauma in non-occupational disease case in *Johnson v. Director, OWCP,* 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied,* 499 U.S. 959 (1991). *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997).

In this case, where claimant sustained a knee injury in 1984 but did not learn of the extent of his disability until 1989, the administrative law judge determined that claimant's disability is related to his 1984 injury and that there was no intervening cause of his 1989 condition. Nevertheless, she awarded benefits based on claimant's 1989 average weekly wage in accordance with *Johnson,* 911 F.2d 247, 24 BRBS 3(CRT), and *Kubin*, 29 BRBS 117. The Board, adhering to the language of Section 10 of the Act, adopted the reasoning of the Fifth and Second Circuits in *LeBlanc*, 130 F.3d 157, 31 BRBS 195(CRT), and *Morales*, 769 F.2d 66, 17 BRBS 130(CRT), and it held that, in all but the Ninth Circuit where *Johnson* controls, the "time of injury" in a traumatic injury case is the date when the accident causing the injury occurred. Thus, benefits awarded in a case involving a latent traumatic injury shall be based on the average weekly wage at the time of the injury and not at the time any latent effects became manifest. Consequently, the Board modified the administrative law judge's award and held that claimant's permanent partial disability benefits must be based on his 1984 average weekly wage. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc,* 32 BRBS 251 (1998).

In a case where claimant suffered immediate partial disability from his work-related knee injury and was unable to return to his longshore work and eventually his disability became total and permanent when a back problem arose as a result of the knee injury, the Ninth Circuit affirmed the Board's holding that claimant's average weekly wage should be calculated at the time of the knee injury. The court distinguished its decision in *Johnson,* 911 F.2d at 247, 24 BRBS at 3(CRT), on the basis that *Johnson* involved a latent injury in which the disabling symptoms of an accident first appeared years after the accident whereas the accident from the instant case resulted in immediate disability, and the totally disabling back condition represented a natural and unavoidable progression of the original knee injury. Consistent with other law on natural progression, average weekly wage is to be calculated as of the time of the initial injury. *Port of Portland v. Director, OWCP [Ronne],* 192 F.3d 933, 33 BRBS 143(CRT)(9th Cir. 1999), *cert. denied*, 120 S.Ct. 1718 (2000).

In this case claimant continued to work several weeks following his work injury and sought to have the date of injury be the date on which he ceased working. The Ninth Circuit held that this was not a case which requires computing claimant's average weekly wage as of a date subsequent to the actual date of injury as this was not a latent injury merely because claimant was not immediately disabled. The court distinguished *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), in that claimant herein immediately knew he was injured, and because *Johnson* was an "exceptional" case. The court declined to hold that the date of injury is always the date claimant stopped working. *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002).

The administrative law judge properly applied the parties' stipulation as to claimant's average weekly wage at the date of injury. The Board rejects employer's argument that, while claimant's average weekly wage at the date of injury is appropriate for short-term temporary disability benefits, claimant's long-term compensation payments for permanent disability should account for industry-wide wage reductions that occurred subsequent to the date of injury. First, there can only be one average weekly wage upon which compensation payments are based, regardless of the type or types of disability for which benefits are found payable. Secondly, in the instant case, the administrative law judge was limited to considering claimant's earnings under Section 10(a), as the record contains claimant's actual earnings during the year preceding the date of injury, and claimant's employment was not seasonal or intermittent. Finally, post-injury events normally are not relevant to compute average weekly wage, and the parties' stipulation was binding upon them, as the administrative law judge did not question its validity. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

The Board affirms the administrative law judge's finding that claimant's actual earnings in the year prior to his injury should be used to calculate his average weekly wage under Section 10(c) as he worked successfully in this job for a significant period. The Board rejected claimant's contention that he would have earned more during this period but for his back pain as the administrative law judge rationally concluded that claimant's testimony in this regard could not be credited. *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

Factors such as inflation and a change of wage rate may affect an employee's projected loss of earnings; therefore, when an employee sustains a second injury, the award of compensation for the first injury should be disregarded if there is more reliable information concerning his wage-earning capacity. Consequently, the Ninth Circuit agreed with the D.C. Circuit's holding in *Hastings*, 628 F.2d 85, and determined that claimant's earning capacity at the time of his second injury must be used in computing the disability award for that injury. *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT) (9th Cir. 1995).

Sections 10(a) and 10(d) do not provide mutually exclusive means by which the administrative law judge is to calculate a claimant's average weekly wage. Rather, the two provisions work in unison to give the administrative law judge a formula to determine claimant's average weekly wage. Section 10(a) specifically serves as one of three methods by which an employee's average annual wage is to be calculated. Section 10(d) then mandates that the administrative law judge divide the average annual wage by 52 to arrive at claimant's average weekly wage. *Diosdado v. Newpark Shipbuilding & Repair, In*c., 31 BRBS 70 (1997).

Decedent's average weekly wage was calculated pursuant to Section 10(c) based solely on the wages he earned during the thirteen weeks he worked for employer. The court affirmed inasmuch as there was substantial evidence to support the administrative law judge's determination that these wages represented his wage-earning capacity at the time of injury. Moreover, the court holds that a claimant may choose to establish his average weekly wage pursuant to Section 10(c) even if he could have chosen to proceed under Section 10(b). As no evidence relevant to Section 10(b) was submitted, that section is inapplicable. *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006).

Definition of Wages

In computing average weekly wage, tax benefits created by deductible losses should not be included as they do not constitute wages under Section 2(13). *Newby v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 155 (1988).

The Board affirmed the administrative law judge's calculation of the decedent's average weekly wage, holding that an employee's average weekly wage should not be reduced by the effective tax rate. The Board further holds that overseas post allowances, foreign housing allowances, foreign service additives, incentive compensation, completion awards, and cost of living adjustments are properly included in average weekly wage as they are readily calculable. *Denton v. Northrop Corp.,* 21 BRBS 37 (1988).

The Board holds that Guaranteed Annual Income payments constitute wages under Section 2(13) and are included in average weekly wage under both the 1972 Act and the 1984 Amendments. The value of the GAI payments are readily calculable, and the fact that the payments are made to the employees from a trust fund rather than from employer is not material. Moreover, the payments are subject to income tax withholding, and thus fall within the amended definition of Section 2(13). *McMennamy v. Young & Co.*, 21 BRBS 351 (1988).

When overtime hours are a regular and normal part of claimant's employment, they should be considered in determining claimant's average weekly wage. Loss of overtime is a factor in determining post-injury wage-earning capacity if overtime was included in claimant's average weekly wage. *Brown v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 110 (1989).

The Board holds for the first time under the 1984 Amendments that container royalty payments to claimant should be included to calculate his average weekly wage. The Board determines that its holding applies the plain language of amended Section 2(13) which defines wages as encompassing advantages included for purposes of tax withholding. The Board rejects argument that they constitute a fringe benefit. The value of the container royalty payment is readily calculable and the payments are made directly to the employee on the basis of seniority and career hours worked. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

The Board reversed the administrative law judge's finding that container royalty payments decedent received are not to be included in the calculation of average weekly wage. The Board has held that such payments, when made pursuant to a contract, are included in an employee's average weekly wage, as they are readily calculable, made directly to the employee, and are part of an employee's taxable income. *See Lopez,* 23 BRBS 295 (1990); *McMennamy,* 21 BRBS 351 (1988). In the instant case, it was undisputed that the container royalty payments decedent received were made pursuant to a collective bargaining agreement, and that employer was bound by that agreement. *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165, 167 (1996).

A post-injury bonus is not relevant to the average weekly wage determination under Section 10(a) of the Act where it is not part of claimant's actual prior earnings. Because a contingent right to a bonus to be paid in the future is, like a fringe benefit, too speculative to be considered as part of the money rate at which the employee is being compensated as of the time of the injury under 33 U.S.C. §902(13), the post-injury bonus did not constitute a "wage" properly includable in computing claimant's average weekly wage at the time of injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.,* 25 BRBS 340 (1992).

The Board affirmed the administrative law judge's conclusion that claimant's vacation, holiday, and container royalty pay, earned prior to his injury, is properly included in the calculation of average weekly wage. *Wright v. Universal Maritime Service Corp.*, 31 BRBS 195 (1997), *aff'd and remanded,* 155 F.3d 311, 33 BRBS 15(CRT)(4th Cir. 1998).

The Fourth Circuit, after analyzing the language of the Act and the legislative history, determined that the phrase "any advantage" should be given its usual meaning while the term "fringe benefits" must be limited to only certain types of fringe benefits. Therefore, the court held that the term "fringe benefits" as used in Section 2(13) refers to those advantages given to an employee, in addition to a monetary salary, whose value is too speculative to be converted into a cash equivalent. Thus, "fringe benefits" are not included in "wages," and "wages" are defined as a dollar measure of compensation provided for 1) an employee's services; 2) by an employer; and 3) under a contract of hiring in force at the time of the injury. (The court questions 9th Cir. decisions in *Wausau* and *McNutt* in a footnote). Using this definition, the Fourth Circuit affirmed the Board and concluded that holiday, vacation and container royalty payments are included as "wages" if the employee earned these payments for services rendered, *i.e.*, the employee satisfied the contract by actually working the requisite number of hours. Because the record lacks evidence as to whether claimant met the contractual hours through actual work or due to a disability credit (in which case the payments would not be "wages" because they would not have been awarded for services), the court remanded the case for the administrative law judge to make this determination. *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), *aff'g and remanding* 31 BRBS 195 (1997).

The Fifth Circuit affirms the administrative law judge's inclusion of container royalty payments in claimant's average weekly wage under Sections 2(13) and 10(c) because they constitute monetary compensation/taxable advantage and not a fringe benefit. They are paid based on a number of hours worked, and thus are in paid in exchange for services rendered. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

The Board affirms the administrative law judge's inclusion of $6,000 paid by decedent's employer into a tax-sheltered annuity (TSA) in decedent's average weekly wage. TSA payments are within the 1984 Act's definition of wages even though they are not subject to tax withholding. The plain language of amended Section 2(13) does not mandate that a benefit not subject to withholding is not a wage. The $6,000 paid into the TSA by decedent's employer was included in his contract of hiring, and was therefore intended to compensate him for his employment services. The Board further holds that the payment does not constitute a fringe benefit under *Morrison-Knudsen*, 461 U.S. 624, 16 BRBS 155 (CRT)(1983). The Board held that the fluidity of the TSA, as evidenced by claimant's rolling over of the TSA into an IRA, places it within the Court's definition of wages, which was formulated pursuant to the 1972 Act. Furthermore, the TSA contribution was included in the salary agreed to under decedent's employment contract. Accordingly, the Board concluded that a TSA payment is a wage as defined by both the 1972 and 1984 Act. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *aff'd in part and rev'd in part on other grounds sub nom. Cretan v. Director, OWCP*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994).

The Board held that in calculating claimant's average weekly wage, his vacation pay should be accounted for in the year it is received, because claimant only "qualified" in the year prior to the injury for vacation pay in the year after the injury. Thus, his wages in the year prior to injury should not include the vacation paid after the injury at post-injury rates. It was only because of the union contract that the vacation earned in the year of the injury was paid after the injury at the next year's wage rate. Similarly, holiday pay earned and paid in the year prior to claimant's work-related injury should be included in calculating claimant's average weekly wage. *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *aff'd in pert. part and modified in part on recon. en banc*, 28 BRBS 271 (1994) (Smith and Dolder, JJ., dissenting in part), *rev'd in part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

On reconsideration, the Board reaffirmed its prior holding that the holiday pay actually paid in the 52-week period preceding the injury is to be included in average weekly wage, on the facts in this case. The Board also reaffirmed its prior holding on the issue of vacation pay and held that vacation pay paid to claimant after his injury cannot be used in calculating claimant's average weekly wage because it represents an accrual method rather than a cash method of calculating earnings, and does not represent what claimant actually received prior to the injury. *Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994) (Smith and Dolder, JJ., dissenting in part), *aff'g in pert. part and modifying in part on recon. en banc*, 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *rev'd in part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

The Ninth Circuit reversed the Board's modification of the administrative law judge's average weekly wage determination. The court held that vacation pay earned during the year prior to claimant's injury but paid after the date of injury was properly included in the calculation of claimant's average weekly wage, noting there was no evidence of confusion or inconvenience associated with such a calculation. *Sproull v. Director, OWCP*, 86 F.3d 895, 899, 30 BRBS 49, 51(CRT)(9th Cir. 1996), *rev'g in pert. part and aff'g on other grounds Sproull v. Stevedoring Services of America,* 25 BRBS 100 (1991) and 28 BRBS 272 (1994)(recon. *en banc*), *cert. denied*, 520 U.S. 1155 (1997).

Taxed unemployment compensation benefits are not includable in calculating average weekly wage under the current version of Section 2(13) as well as under the pre-1984 provision. *Blakney v. Delaware Operating Co.*, 25 BRBS 273 (1992).

Inasmuch as the "subsistence and quarters" was provided to claimant by employer under the terms of claimant's employment contract, and the value of these services is readily ascertainable at a daily rate of $30, the room and board provided by employer cannot be deemed a fringe benefit as the amount is readily calculable under Section 2(13) of the Act. The fact that the funds are not subject to withholding tax under the Internal Revenue is not dispositive of this issue. These funds therefore are "wages" within the meaning of the Act and the Board modifies the administrative law judge's decision to include them in average weekly wage. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), *rev'd sub nom. Wausau Ins. Companies v. Director, OWCP,* 114 F.3d 120, 31 BRBS 41 (CRT)(9th Cir. 1997).

The Ninth Circuit held that the definition of wages under Section 2(13) is controlled by the Internal Revenue Code's criteria. Under 26 U.S.C. §119(a), claimant's meals and lodging were not income, as they were provided for the convenience of employer, the meals were furnished on employer's business premises, and claimant was required to accept such lodging as a condition of employment. Thus, the court held that the value of claimant's meals and lodging should not have been included as wages under Section 2(13). *Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41 (CRT)(9th Cir. 1997), *rev'g in pert. part Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996).

The Board affirms the administrative law judge's inclusion in claimant's average weekly wage of the value of room and board provided by employer, as room and board are not fringe benefits under a benefit plan. The Board declines to follow *Wausau Ins. Cos.,* 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), outside the Ninth Circuit, explaining that the court's restriction on the term "wages" in Section 2(13) is not consistent with the rules of statutory construction. Section 2(13) states that wages includes the reasonable value of any advantage received from employer and subject to withholding, but the term "including" is not a limit on the definition of wages but is merely one item that is clearly included. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd in pert. part,* 206 F.3d 474, 34 BRBS 23 (CRT)(5th Cir. 2000).

The Fifth Circuit agreed with the Ninth Circuit's holding in *Wausau,* 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), that Section 2(13), on its face, excludes from the definition of "wages" the value of meals and lodging that are exempted from federal income taxation by Section 119 of the Internal Revenue Code (furnished for convenience of employer, on employer's premises, as condition of employment). The court stated that the Board's construction of Section 2(13) reads the phrase "and included for purposes of any withholding of tax under subtitle C of title 26" out of the statute. The court concludes that "wages" equals monetary compensation plus taxable advantages. *H.B. Zachery Co. v. Quinones,* 206 F.3d 474, 34 BRBS 23(CRT)(5th Cir. 2000), *rev'g in pert. part* 32 BRBS 6 (1998).

The Ninth Circuit held that, consistent with its holding in *Wausau Ins. Co. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), while the *per diem* the claimant in this case received from employer in order to pay for his room and board while working abroad was an “advantage,” it was not a “wage” because it was not subject to withholding under the Internal Revenue Code. *McNutt v. Benefits Review Board,* 140 F.3d 1247, 32 BRBS 71(CRT) (9th Cir. 1998).

In addressing the issue of whether tips may be included in the calculation of a claimant's average weekly wage under amended Section 2(13), the Board held that if the contract of hire between claimant and employer contemplated tips as part of the "money rate" at which claimant was to be compensated, then claimant's tips must be included in her average weekly wage. As the administrative law judge did not address this question, and there was evidence in the record which, if credited, could support a finding that tips were part of the "money rate" at the time of claimant's contract of hire, the Board vacated the determination that tips are not to be included in the calculation of claimant's average weekly wage and remanded the case for reconsideration of this issue. *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1997).

Considering employer’s contention in its motion for reconsideration, the Board reaffirmed its previous holding that the term “including any advantage received from employer and included for purposes of tax withholding” as used in Section 2(13) is meant to be exemplary, not exclusive, and that claimant’s tips must be included in her average weekly wage if they were part of the “money rate” under the contract of hiring. In rendering its decision, the Board declined to follow *Wausau Ins. Cos.,* 114 F.3d 120, 31 BRBS 41(CRT)(9th Cir. 1997), since this case is outside the Ninth Circuit, and instead followed its decision in *Quinones,* 32 BRBS 6 (1998), and the Fourth Circuit’s decision in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT)(4th Cir. 1998). *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999).

The Board reversed the administrative law judge's exclusion of the value of the *per diem* claimant receives from employer from claimant's average weekly wage, in this case arising in the Fourth Circuit. The *per diem* at issue here is part of the money claimant receives from employer, and is thus includable in average weekly wage under the first clause of Section 2(13), regardless of whether it is subject to tax withholding, as it is included in claimant's pay check from employer every week and was part of the agreement, or contract, under which claimant was hired. The Fourth Circuit, in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), and the Board interpret the term "including" which prefaces the second clause of the first sentence of Section 2(13) as exemplary, rather than exclusive, and the disparate interpretations of this section by the Fifth and Ninth Circuits are discussed. The value of the free room and board claimant receives, however, is not includable in addition to the *per diem* to avoid double recovery. *Roberts v. Custom Ship Interiors,* 35 BRBS 65 (2001), *aff'd,* 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied,* 537 U.S. 1188 (2003).

The Fourth Circuit rejected employer's argument that claimant's *per diem* was a nontaxable payment intended to reimburse claimant for his meal and lodging expenses. The court relied on *Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), and distinguished *Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000), and *Wausau, Inc.*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997). The court reasoned that claimant's *per diem* was paid weekly in claimant's paycheck pursuant to his employment contract, and the money was paid with no restrictions and despite employer's knowledge that Carnival Cruise Lines provided free food and lodging to ship remodelers. Thus, the payment was not a true reimbursement linked to any actual expenses, and it was virtually indistinguishable from claimant's regular wages. Accordingly, the Fourth Circuit affirmed the Board's decision and held that claimant's *per diem* is to be included in his average weekly wage. *Custom Ship Interiors v. Roberts*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *aff'g* 35 BRBS 65 (2001), *cert. denied,* 537 U.S. 1188 (2003).

Although the Board held that the one-time payment of $4,000 claimant received in 1996 in return for the termination of the GAI program constituted "wages" under Section 2(13), it reversed the administrative law judge's inclusion of that amount in the calculation of claimant's average weekly wage. The Board held that the one-time payment is more akin to a bonus and is a singular event which, if included, would inflate claimant's weekly wage beyond what he is reasonably expected to earn in future years. As claimant's injury had no effect on his ability to receive this amount in 1996 or on his inability to receive it in the future, it should not be included to compensate him for earnings lost due to his injury. In addition to guidance from the Fourth Circuit's decision in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), the Board considered this situation analogous to other Section 10(c) cases wherein an unusual event occurred during the year, making the claimant's actual earnings for that year not representative of his annual earning capacity. In those situations, the administrative law judge is not restricted to using actual earnings to approximate earning capacity. Accordingly, the Board modified the administrative law judge's decision to exclude the $4,000 payment from claimant's average weekly wage. *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

SECTION 10(a)

Employer's reliance on Newpark Shipbuilding & Repair, Inc. v. Roundtree, 698 F.2d 743, 15 BRBS 94 (CRT)(5th Cir. 1983), rev'd en banc, 723 F.2d 339, 16 BRBS 34 (CRT)(5th Cir. 1984), cert. denied, 469 U.S. 818 (1984), mandating the use of Section 10(a) if the "substantially the whole of the year" test is met, is misplaced since this case is not binding precedent in view of its reversal by the court sitting en banc on procedural grounds. Where claimant receives wage increases in the year prior to injury, Section 10(c) is appropriate as Section 10(a) cannot be fairly and reasonably applied. Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986), rev'd on other grounds, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

In vacating the administrative law judge's finding that Section 10(a) was not applicable in determining claimant's average weekly wage, the Board held that, since average weekly wage includes vacation pay in lieu of vacation, six weeks of vacation time should have been included as time actually worked during the year preceding claimant's injury, giving him a total of 34.5 weeks. Inasmuch as employer admitted that claimant's work as a station attendant was full-time and steady, the Board remanded the case for the administrative law judge to calculate the claimant's average weekly wage pursuant to Section 10(a). Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, so time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. *Duncan v. Washington Metropolitan Area Transit Authority,* 24 BRBS 133 (1990).

The Fifth Circuit holds that the administrative law judge properly applied Section 10(a) in determining claimant's average weekly wage, rejecting employer's suggestion that Section 10(c) should apply to account for a post-injury economic decline in claimant's field of employment. First, the court found nothing in the statute to suggest that either subsection (a) or (b) may be deemed inapplicable solely on the basis of economic fluctuations subsequent to the time of injury or that such an occurrence should inure to the benefit of employer. Second, in the instant case, the court rejected the application of Section 10(c) as claimant's work was not intermittent or discontinuous and no harsh results will follow from determining average weekly wage pursuant to Section 10(a). *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 441-443, 30 BRBS 57, 59-61(CRT) (5th Cir. 1996).

The Board affirmed the administrative law judge's calculation of claimant's average weekly wage under Section 10(a) as claimant worked substantially the whole of the year preceding the injury and as the administrative law judge rationally calculated the number of days claimant worked by dividing the number of hours worked by eight. *Diosdado v. Newpark Shipbuilding & Repair, In*c., 31 BRBS 70 (1997).

The administrative law judge erred in calculating claimant's average weekly wage under Section 10(a) by dividing claimant's yearly earnings in 1991 by the number of weeks worked during the year. The court held that the administrative law judge must first calculate claimant's average daily wage by determining the total income claimant earned in the 52 weeks preceding the work injury, divide that sum by the actual number of days claimant worked, multiply by 260 or 300 as appropriate, and divide by 52. *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The Ninth Circuit holds that an administrative law judge must apply Section 10(a) to calculate claimant's average weekly wage where claimant worked more than 75% of the workdays of the year prior to injury. Under these circumstance, Section 10(c) may not be invoked merely because a calculation under Section 10(a) would inflate claimant's actual earnings. Moreover, the court notes that Section 10(a) is not precluded in cases where the claimant works fewer than 75% of the workdays if other relevant factors are present. The court remands the case to the administrative law judge to calculate the award under Section 10(a) since claimant worked 82% of the workdays in the year prior to injury. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

The Board affirms the administrative law judge's finding that Section 10(a), rather than 10(c) applies, as the Ninth Circuit in *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), held that Section 10(a) must be applied to calculate average weekly wage when the claimant worked 75 percent or more of the workdays in the year preceding the injury, if the number of days worked is known. In this case, claimant worked over 75 percent of available work days and the administrative law judge found that his work was not intermittent. Under Section 10(a), however, the administrative law judge must first determine an average daily wage, multiply that figure by 260 to obtain claimant's annual earning capacity, then divided by 52 under Section 10(d); the administrative law judge merely divided claimant's earnings by 52. As the proper computation can be made based on the administrative law judge's findings, the decision is modified to reflect the correct average weekly wage. *Price v. Stevedoring Services of America,* 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds,* 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *and aff'd and rev'd on other grounds,* No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), *cert. denied,* 125 S.Ct. 1724 (2005).

The Ninth Circuit reaffirms its bright line rule from *Matulic,* 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), that Section 10(a) applies when claimant works more than 75% of the workdays of the measuring year. Claimant worked 75.77% of available days, so the court holds the administrative law judge properly applied Section 10(a). The court rejects employer's contention that claimant's employment was intermittent and casual such that Section 10(c) should apply merely because claimant did not work the same number of days every week. The court holds that a determination of whether claimant's employment is casual, irregular, seasonal, intermittent and discontinuous for purposes of applying Section 10(c) must be based on the nature of the employment and of the industry itself, not merely on the prior work history of a particular claimant. *Stevedoring Services of America v. Price,* 382 F.3d 878, 38 BRBS 51(CRT)(9th Cir. 2004), *aff'g in pert. part. and rev'g on other grounds* 36 BRBS 56 (2002), *cert. denied,* 125 S.Ct. 1724 (2005).

The Board rejected employer's contention that the administrative law judge erred in calculating claimant's average weekly wage using Section 10(a) of the Act instead of Section 10(c). Under Section 10(a), claimant's average weekly wage computes to approximately $12,000 more than his actual annual earnings. This case arose in the Ninth Circuit, and that court held *Matulic,* 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), that Section 10(a) is presumed to apply if a claimant works 75% or more of the workdays of the measuring year. Thus, Section 10(a) applies to this case where claimant worked 77.4% of the workdays. Overcompensation alone is insufficient to rebut the use of Section 10(a), and employer raised no other basis for finding Section 10(a) inapplicable. *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), *aff'd,* 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied,* 126 S.Ct. 1023 (2006).

The Ninth Circuit rejected employer's arguments and reaffirmed its decision in *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT). The Ninth Circuit stated that as claimant worked 77.4% of the year his case fits squarely into the rule established by *Matulic* and requires that Section 10(a) of the Act be applied to determined claimant's average weekly wage. Consequently, the Ninth Circuit affirmed the use of Section 10(a) to calculate claimant's average weekly wage. *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *aff'g* 37 BRBS 65 (2003), *cert. denied,* 126 S.Ct. 1023 (2006).

The Board affirmed the administrative law judge's calculation of claimant's average weekly wage. While the administrative law judge, at the hearing, stated that he was presented with evidence that claimant earned $9,648 during the year prior to the injury, he was not bound to use this figure, and requested that counsel independently confirm this figure. In his Decision and Order, the administrative law judge rationally applied the figures claimant submitted into evidence, which showed that claimant earned $10,701 for 174 days of work during the 52-week period prior to his injury. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

On reconsideration, the Board holds that it erred in dividing the total number of hours claimant worked by 8 in order to determine the number of days claimant worked for purposes of calculating average weekly wage under Section 10(a). Section 10(a) itself, as well as case law interpreting it, states that only the actual number of days worked should be used to calculate claimant's average daily wage. The Board thus modifies its decision to affirm the administrative law judge's calculation under Section 10(a) utilizing only the actual number of days claimant worked. The Board notes that dividing the number of hours worked by 8 had the effect in this case of diluting claimant's earnings and resulted in claimant's having "worked" more than the 260 days maximum for a 5-day per week worker. *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 89 (1999)(decision on recon.), *aff'd,* 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000).

The Fifth Circuit affirms the average daily wage determination, pursuant to Section 10(a). The court held that the administrative law judge rationally treated as days worked four vacation days claimant actually took. Moreover, the administrative law judge rationally determined that eleven vacation days claimant "sold back" to employer and did not actually take were not days worked for purposes of calculating claimant's average daily wage. The money received for the eleven unused vacation days was correctly treated as additional compensation and added to claimant's annual wage under these circumstances. *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT)(5th Cir. 2000), *aff'g* 33 BRBS 88 (1999).

As the record contained only partial information about claimant's work history over the year immediately preceding his work injury, with no indication of whether he worked five days or six days per week, the administrative law judge properly concluded that Section 10(a) could not be applied to calculate claimant's average weekly wage. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

The Fifth Circuit affirmed the use of Section 10(a) to calculate claimant's average weekly wage where the claimant had worked 91 percent of the available workdays as this is "substantially the whole of the year." The court noted that Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn if he had worked every available work day in the year, even if there is some overcompensation. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

Section 10(a) requires evidence from which the administrative law judge can determine the average daily wage claimant earned during the preceding twelve months. Claimant's W-2 statements and payroll records from his employers during the year prior to his injury fail to show the actual number of days he worked. As the record lacks this necessary evidence, Section 10(a) cannot be applied. *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006).

Section 10(a) applies when a claimant worked substantially the whole of the year in the "same" employment, whether for the named employer or for other employers. The Board affirms the administrative law judge's finding that claimant's employment in Iraq was not comparable to his employment in the United States. The administrative law judge rationally inferred, in the absence of contrary evidence, that claimant's job title of labor foreman denoted managerial responsibilities which claimant did not have in his stateside positions as a laborer and maintenance worker. Moreover, the administrative law judge rationally found that claimant's work in a combat zone is inherently different than his work in the Untied States by virtue of the dangerous location and the fact that his job included safety and security requirements that would not have been required of him in his work in the United States. The administrative law judge acted within his discretion in considering the extrinsic circumstances of claimant's employment when discussing the comparability of claimant's overseas and stateside employment. The Board discusses *Mulcare*, 18 BRBS 158 (1986), and holds it is distinguishable. *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006).

SECTION 10(b)

The administrative law judge properly concluded that Section 10(b) should not be used to compute claimant's pre-injury average weekly wage in view of claimant's frequent job changes, his tendency to get fired, his previous convictions, his brief period of employment with employer, his lack of seniority, his routine lay-off shortly after the injury, and the misrepresentations which he made on his employment application. Harrison v. Todd Pacific Shipyards Corp.,
21 BRBS 339 (1988).

The Board rejects claimant's contention that her survivor's benefits should be based on the average weekly wage of a like employee at the time of death under Section 10(b) as this argument was rejected by the Board in *Bell*, 16 BRBS 243 (1984). *Buck v. General Dynamics Corp., Electric Boat Div.*, 22 BRBS 111 (1989).

The Fifth Circuit held that although there is some evidence that claimant's employment at the time of injury would have led to permanent employment, the administrative law judge's finding that claimant's employment was intermittent and discontinuous is supported by substantial evidence, and accordingly the administrative law judge did not abuse his discretion in determining that claimant's average weekly wage should be calculated under Section 10(c) instead of Section 10(b). Moreover, claimant presented no evidence of the wages of co-workers, which is necessary for an average weekly wage calculation under Section 10(b). *Hall v. Consolidated Employment Systems, Inc.,* 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998).

The administrative law judge erred in purporting to rely on Section 10(b). The record contains no evidence of the wages of an employee of the same class who worked substantially the whole year in the same or similar employment. The Board thus reviews the administrative law judge's findings pursuant to Section 10(c). *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006).

SECTION 10(c)

The D.C. Circuit held that on the facts of the case there is no reason to depart from the general rule that post-injury events are not relevant to a determination of average weekly wage under Section 10(c). Section 10(c) is applicable because claimant had not worked substantially the whole of the year prior to her injury, and there were no employees of the same class, as claimant had just completed a training program. As a recent graduate of a training program it was appropriate to look to a bus driver's wages instead of those of a trainee, but there is nothing that warranted use of any factors other than her actual hourly rate prior to the injury. *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1987).

In calculating claimant's average weekly wage under Section 10(c), the administrative law judge considered claimant's history of pay raises during the year proceeding injury, annualized claimant's January to June earnings of that year and arrived at an average weekly rate. Given claimant's history of pay raises, the Board held that the administrative law judge's calculations reasonably approximated claimant's earning capacity at the time of injury and affirmed this method of computation. Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986), rev'd on other grounds, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991).

The administrative law judge did not err in determining claimant's average weekly wage under Section 10(c) based solely on his part-time earnings as a longshoreman. The administrative law judge considered the 30 hours per week claimant worked without pay as a trainee-cook but found this work irrelevant to his average weekly wage determination. Since claimant voluntarily undertook this position long before he sustained the work-related injury, to hold employer responsible for claimant's pre-injury removal of himself from the work force would be manifestly unfair and contrary to the purpose of the Act. Geisler v. Continental Grain Co., 20 BRBS 35 (1987).

The Board affirms the computation of average weekly wage under Section 10(c) where claimant worked intermittently whenever fishing boats arrived at the harbor. The administrative law judge rationally relied solely on claimant's income tax records over hearing testimony regarding the amount claimant earned. *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987).

The Board rejects employer's contention that claimant's average weekly wage must be less than the minimum wage at the time of her injury based on the fact that claimant had never consistently worked time. The administrative law judge's use of claimant's actual wages at the time of injury to approximate annual earning capacity under Section 10(c) is affirmed. *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

The Sixth Circuit remanded the case to the administrative law judge for recalculation of claimant's average weekly wage under Section 10(c), instructing him to base the calculation on only that portion of the relevant year during which claimant was not on strike. The court noted that Section 10(c) requires that claimants be "allowed to offer evidence as to what they earned or would have earned but for periods of involuntary non-work such as labor strikes." This issue had not been raised or addressed in the Board's disposition of the case. Hawthorne v. Director, OWCP, 844 F.2d 318, 21 BRBS 22 (CRT)(6th Cir. 1988).

The administrative law judge properly calculated claimant's average weekly wage pursuant to Section 10(c), rather than Section 10(a), even though claimant had worked during most of the weeks of the one-year period preceding his injury. The Board reasoned that calculating claimant's average weekly wage under Section 10(a) in this case, where weather conditions had caused work to be available to claimant on only an intermittent basis (and the amount of pay he received for a given day to thus be variable), would distort the projection of what claimant could have earned had he continued to work in the same job beyond the date of his injury, in that Section 10(a) presupposes that work would be available to the claimant each day. The administrative law judge's utilization of Section 10(c) was thus within his discretion. Gilliam v. Addison Crane Co., 21 BRBS 91 (1987).

Where uncontradicted evidence establishes that claimant's occupational disease caused his pre-retirement work difficulties and subsequent reductions in income, Board reverses administrative law judge's finding that claimant experienced no compensable disability until after he retired in 1983, and holds that claimant is entitled to permanent partial disability benefits from the 1978 date on which his difficulties began to affect his income. Since claimant's disability preceded his retirement, the average weekly wage on which his awards are to be based must be determined pursuant to Section 10(c), rather than Section 10(d)(2), which applies in cases involving "post-retirement" injuries. Wayland v. Moore Dry Dock, 21 BRBS 177 (1988).

In computing claimant's pre-injury average weekly wage, the administrative law judge reasonably relied in part upon the actual earnings of another employee without seniority who worked for employer in 1982, because claimant was only employed by employer for a 2-month period. He then averaged these hypothetical 1982 earnings and the minimum wage rate in 1981 and 1982, when claimant received minimal earnings from part-time employment. Board rejects employer's argument that administrative law judge should have used only the minimum wage rate because of claimant's earnings history and short-term employment with employer. The administrative law judge instead relied upon claimant's "good fortune" in obtaining a higher-paying job with employer in 1982. Administrative law judge reasonably relied upon an average annual earnings figure which is higher than that which was previously enjoyed by claimant. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988).

The Boards holds that administrative law judge followed the plain language of Section 10(c) by relying on claimant's hourly earnings at the time of injury and the number of hours worked the preceding year by two other employees of employer in the same occupation to determine claimant's average weekly wage. Board holds that administrative law judge properly did not consider downturn in employer's business that occurred more than one year after the work injury. *Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990), *rev'd on other grounds*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991).

The administrative law judge erred in calculating claimant's average weekly wage by dividing his earnings during the first 38 weeks of 1984 by 52 because he failed to account for periods claimant would have been able to work absent his injury and his determination only accounted for claimant's earnings during the 38 weeks preceding his injury. Under Section 10(c), administrative law judge should determine claimant's average annual earnings by arriving at a figure approximating an entire year of work and then dividing this figure by 52. *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990).

The administrative law judge properly applied Section 10(c) to determine claimant's average weekly wage in his second, part-time job as a real estate agent. Claimant's earnings from real estate sales were recorded upon the closing of a sale even though the work may have been done months earlier, and his commission income was recorded quarterly. Under these circumstances, the Board held it was appropriate for the administrative law judge to divide claimant's real estate commission income, paid in the third quarter by the 39 preceding weeks to determine his average weekly wage from sales. The Board noted that Section 10(a) cannot be fairly applied when there is no information from which an average daily wage can be calculated. *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990).

The administrative law judge properly utilized Section 10(c) to calculate claimant's average weekly wage. Although claimant worked for employer for 45 weeks in the year preceding her injury, the record does not contain evidence from which claimant's average daily wage can be calculated; therefore, Section 10(a) cannot be applied. Moreover, the administrative law judge acted within his broad discretion under Section 10(c) in including in claimant's average weekly wage the seven weeks during the year preceding her injury that claimant would have worked for employer but for her attendance at her mother's funeral and to her mother's affairs. The administrative law judge rationally concluded that the funeral is a non-recurring event similar to a personal illness or strike and that as such the time should be included in average weekly wage. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

The Fifth Circuit held that the administrative law judge properly used claimant's wages as a salesman, a job claimant held 2 years prior to his injury, to calculate claimant's average weekly wage pursuant to Section 10(c) where claimant's longshoring work in the 52 weeks prior to his injury was intermittent, and therefore his wages during that period did not reasonably and fairly represent his wage-earning capacity. The court approved the Board's decision in *Anderson*, 13 BRBS 593 (1981),which held that if average weekly wage is calculate by considering the claimant's earning history over a period of years prior to the injury, all the years within the period must be included. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

The Eighth Circuit affirmed the administrative law judge's calculation of average weekly wage as reasonable where it took into consideration the number of days claimant averaged per year as a longshoreman from 1984-1989 and determined the average weekly wage based upon claimant's current daily wage. *Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied,* 118 S.Ct. 1301 (1998).

All sources of a claimant's income, including commissions, are to be included in average weekly wage. The Board affirms the administrative law judge's consideration of only claimant's 1977 net earnings in arriving at an average weekly wage under Section 10(c). The Board rejects employer's contention that since claimant was self-employed claimant's average weekly wage should be based on the cost of hiring another employee of equivalent skill and experience. *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).

The administrative law judge rationally calculated claimant's average weekly wage under Section 10(c) by dividing claimant's stipulated annual earnings by the number of weeks he worked. The fact that claimant's earnings reflected a pay scale no longer available after claimant's injury is not determinative as post-injury events are not generally relevant to average weekly wage determinations. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

The Board affirms the administrative law judge's use of Section 10(c) to calculate claimant's average weekly wage. Claimant worked a series of 13-week contracts and was forced to take a period of leave between contracts. As claimant's employment was not continuous and as the contract had to be renewed before each work period, the administrative law judge rationally found that Section 10(a) could not be applied. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), *rev'd on other grounds sub nom. Wausau Ins. Companies v. Director, OWCP,* 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997).

The Fifth Circuit holds that the administrative law judge properly applied Section 10(a) in determining claimant's average weekly wage, rejecting employer's suggestion that Section 10(c) should apply to account for a post-injury economic decline in claimant's field of employment. First, the court found nothing in the statute to suggest that either subsection (a) or (b) may be deemed inapplicable solely on the basis of economic fluctuations subsequent to the time of injury or that such an occurrence should inure to the benefit of employer. Second, in the instant case, the court rejected the application of Section 10(c) as claimant's work was not intermittent or discontinuous and no harsh results will follow from determining average weekly wage pursuant to Section 10(a). *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 441-443, 30 BRBS 57, 59-61(CRT) (5th Cir. 1996).

The Board affirmed the administrative law judge's determination that the calculation of claimant's average weekly wage should be made pursuant to Section 10(c) of the Act, not Section 10(a), as the evidence did not clearly establish that claimant worked in the same employment for "substantially the whole of the year" prior to her injury. *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1997).

In calculating claimant's average weekly wage, the administrative law judge, purportedly pursuant to Section 10(a), multiplied claimant's hourly rate at the time of his injury by his normal work week of 40 hours. The Board held that although this is not a Section 10(a) calculation, the administrative law judge's conclusion regarding claimant's average weekly wage reflects a reasonable method of calculation under Section 10(c). Consequently, the Board held that the administrative law judge's citation to Section 10(a) is harmless and affirmed his determination of claimant's average weekly wage under Section 10(c). *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

The Board held that, although this case arises under the D.C. Act and the 1984 Amendments to the Longshore Act are not applicable, the administrative law judge properly determined that claimants are entitled to death benefits based on decedent's average weekly wage as of the year before his death. Long-standing precedent provides that the "time of injury" in an occupational disease case is the date on which the disability becomes manifest; thus, the "time of injury" for determining average weekly wage is the date on which the occupational disease becomes manifest through a loss of wage-earning capacity. As decedent was diagnosed with chronic active hepatitis in 1977 but continued working until his occupational disease hospitalized him and then caused his death 1992, it is consistent with case law to base his average weekly wage on the wages earned in the year preceding his death, and this compensates claimants for the full extent of decedent's wage loss. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

In making a determination of average weekly wage under Section 10(c), the administrative law judge must determine the average weekly wage at the time of the injury. Accordingly, if the administrative law judge looks beyond the one year immediately preceding the injury, he must take into account the earnings of all the years within that period. The court holds that the administrative law judge erred in using claimant's wages from 1988 when the injury occurred in 1992 given claimant's own testimony that his work in the three years immediately preceding the accident had been intermittent because work had not been available. *New Thoughts Finishing Company v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997).

The Board affirms the administrative law judge's finding that claimant's actual earnings in the year prior to his injury should be used to calculate his average weekly wage under Section 10(c) as he worked successfully in this job for a significant period. The Board rejected claimant's contention that he would have earned more during this period but for his back pain as the administrative law judge rationally concluded that claimant's testimony in this regard could not be credited. *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

The Board affirmed the administrative law judge's determination that the calculation of claimant's average weekly wage should be made pursuant to Section 10(c) of the Act, not Section 10(a), as claimant's payroll records failed to apportion the number of hours worked by claimant during a pay period to specific days, and thus, claimant could not establish that he was either a five-day or six-day per week worker. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

The Ninth Circuit affirmed the Board's affirmance of the administrative law judge's calculation of claimant's average weekly wage under Section 10(c), and not Section 10(a), because the payroll summaries did not establish the number of days claimant worked per week. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997).

The Board affirmed the administrative law judge's calculation of claimant's average weekly wage under Section 10(c), which included income derived from a part-time job, as the administrative law judge's decision to credit claimant's testimony that he can no longer perform this part-time job was rational and supported by substantial evidence. *Wilson v. Norfolk & Western Railway Co.*, 32 BRBS 57 (1998), *rev'd mem.*, 7 Fed. Appx. 156 (4th Cir. 2001).

The Fifth Circuit held that although there is some evidence that claimant's employment at the time of injury would have led to permanent employment, the administrative law judge's finding that claimant's employment was intermittent and discontinuous is supported by substantial evidence, and accordingly the administrative law judge did not abuse his discretion in determining that claimant's average weekly wage should be calculated under Section 10(c) instead of Section 10(b). *Hall v. Consolidated Employment Systems, Inc.,* 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998).

The Fifth Circuit held that the administrative law judge did not abuse his discretion when, in calculating claimant's average weekly wage under Section 10(c), he did not include the wages from the year 1991 (the year of the injury) because the administrative law judge determined that the wages at the time of injury did not adequately represent his earning capacity. The administrative law judge instead used the average of claimant's income in the years 1983-1990. The court cautioned that it will be an exceedingly rare circumstance wherein claimant's earnings at the time of injury are wholly disregarded as irrelevant, unhelpful or unreliable. *Hall v. Consolidated Employment Systems, Inc.,* 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998).

The Fourth Circuit rejected employer's argument that holiday, vacation and container royalty payments are "fringe benefits" because, due to the delay between when they are earned and when they are distributed, they are too speculative to calculate for purposes of determining a claimant's average weekly wage. The court stated that, contrary to employer's presumption, Section 10(a) need not be used to determine average weekly wage; rather, use of Section 10(c) would be appropriate due to the timing of the payments. In this case, the court stated that claimant's average weekly wage could be determined by adding his monetary wages to the holiday and vacation pay specified by the local contract and then using the most recent container royalty payment as an approximation of the money he would earn as a container royalty. If claimant did not earn the payments through work, but rather through disability credit, then they are not "wages" and they are not included in average weekly wage. Because the record does not demonstrate whether claimant earned his holiday, vacation and container royalty payments through work, the court remanded the case for further consideration of this issue. *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), *aff'g and remanding* 31 BRBS 195 (1997).

The credited evidence showed that although tipping was not formally part of any written or oral contract of hire, it was understood to be part of claimant's earnings, condoned and tolerated by employer. Thus, the Board affirmed the administrative law judge's determination on remand that tips were part of the "money rate" by which claimant was compensated by employer, as it was rational and supported by substantial evidence. Moreover, the Board affirmed the administrative law judge's crediting of claimant's records of tips, and her ultimate calculation of claimant's average weekly wage pursuant to Section 10(c), as the result reached was reasonable and supported by substantial evidence. *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999).

The Fifth Circuit affirmed the administrative law judge's use of Section 10(c) to calculate claimant's average weekly wage as the administrative law judge found that the 42 weeks claimant worked failed to fairly represent the whole of a year, and thus Section 10(a) was inapplicable. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

The Fifth Circuit affirms the average weekly wage calculation under Section 10(c) arrived at by using claimant's actual wages divided by 48 weeks, as claimant was off for four weeks because of an unrelated in jury. The court notes that this divisor is in technical violation of Section 10(d), but states that the same result obtains as if the administrative law judge had added four weeks' salary to the wages earned and divided by 52. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

The First Circuit held that substantial evidence supports the administrative law judge's calculation of claimant's average weekly wage under Section 10(c) by taking the wages he earned during 39 weeks accounted for in a wage report and dividing that amount by 31 weeks (wage report indicated no earnings in 8 weeks). *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

The Fifth Circuit determined that the administrative law judge acted within his authority in

estimating claimant's average weekly wage using Section 10(c) and the most recent year of employment, rejecting employer's assertion that an administrative law judge may not rely exclusively on the preceding year's wages. Thus, the Fifth Circuit affirmed the administrative law judge's computation based on claimant's wages in the year preceding his injury, even though that year consisted of only 27 working weeks, as substantial evidence supports the finding that these wages most accurately reflect claimant's earning capacity at the time of injury. Moreover, the court held that it was proper to account for time lost due to another work injury by dividing the annual earnings by 27 (which yields the same mathematical result as increasing the estimate of claimant's annual earning and dividing by 52). *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000).

Although the Board held that the one-time payment of $4,000 claimant received in 1996 in return for the termination of the GAI program constituted "wages" under Section 2(13), it reversed the administrative law judge's inclusion of that amount in the calculation of claimant's average weekly wage. The Board held that the one-time payment is more akin to a bonus and is a singular event which, if included, would inflate claimant's weekly wage beyond what he is reasonably expected to earn in future years. As claimant's injury had no effect on his ability to receive this amount in 1996 or on his inability to receive it in the future, it should not be included to compensate him for earnings lost due to his injury. In addition to guidance from the Fourth Circuit's decision in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), the Board considered this situation analogous to other Section 10(c) cases wherein an unusual event occurred during the year, making the claimant's actual earnings for that year not representative of his annual earning capacity. In those situations, the administrative law judge is not restricted to using actual earnings to approximate earning capacity. Accordingly, the Board modified the administrative law judge's decision to exclude the $4,000 payment from claimant's average weekly wage. *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

The Ninth Circuit reaffirms its bright line rule from *Matulic,* 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), that Section 10(a) applies when claimant works more than 75% of the workdays of the measuring year. Claimant worked 75.77% of available days, so the court holds the administrative law judge properly applied Section 10(a). The court rejects employer's contention that claimant's employment was intermittent and casual such that Section 10(c) should apply merely because claimant did not work the same number of days every week. The court holds that a determination of whether claimant's employment is casual, irregular, seasonal, intermittent and discontinuous for purposes of applying Section 10(c) must be based on the nature of the employment and of the industry itself, not merely on the prior work history of a particular claimant. *Stevedoring Services of America v. Price,* 382 F.3d 878, 38 BRBS 51(CRT)(9th Cir. 2004), *aff'g in pert. part. and rev'g on other grounds* 36 BRBS 56 (2002), *cert. denied,* 125 S.Ct. 1724 (2005).

Decedent's average weekly wage was calculated pursuant to Section 10(c) based solely on

the wages he earned during the thirteen weeks he worked for employer. The court affirmed inasmuch as there was substantial evidence to support the administrative law judge's determination that these wages represented his wage-earning capacity at the time of injury. Moreover, the court holds that a claimant may choose to establish his average weekly wage pursuant to Section 10(c) even if he could have chosen to proceed under Section 10(b). As no evidence relevant to Section 10(b) was submitted, that section is inapplicable. *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006).

Although Section 10(a) is not applicable, the Board reviews the comparability of claimant's jobs as it is relevant to Section 10(c). The Board affirms the administrative law judge's finding that claimant's employment in Iraq was not comparable to his employment in the United States. The administrative law judge rationally inferred, in the absence of contrary evidence, that claimant's job title of labor foreman denoted managerial responsibilities which claimant did not have in his stateside positions as a laborer and maintenance worker. Moreover, the administrative law judge rationally found that claimant's work in a combat zone is inherently different than his work in the Untied States by virtue of the dangerous location and the fact that his job included safety and security requirements that would not have been required of him in his work in the United States. The administrative law judge acted within his discretion in considering the extrinsic circumstances of claimant's employment when discussing the comparability of claimant's overseas and stateside employment. The Board discusses *Mulcare*, 18 BRBS 158 (1986), and holds it is distinguishable. *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006).

Although Section 10(c) permits the use of wages from claimant's other prior employment, it does not require such use. Use of only the wages claimant earned from employer appropriately reflects the increase in pay claimant received when he commenced working for employer in Iraq, and fully compensates claimant for the earnings he lost due to his injury. Moreover, post-injury events, such as decreased work opportunities or wages, generally are irrelevant to the calculation of claimant's average weekly wage. The Board therefore affirmed the administrative law judge's average weekly wage calculation under Section 10(c) based solely on claimant's wages in Iraq, as he had "regard to the previous earning of the injured employee in the employment in which he was working at the time of the injury." *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006).

Consideration of post-injury factors may be appropriate pursuant to Section 10(c) where a claimant's previous earnings do not realistically reflect the claimant's wage-earning potential. The case is remanded for the administrative law judge to address claimant's contention that her "annual earning capacity" is greater than that found by the administrative law judge as demonstrated by the other employees' earnings and in view of the overtime she would have earned but for her injury. Claimant raised this issue in the initial proceeding and on modification, and the administrative law judge erroneously declined to address it. *S.K. v. Service Employers Int'l, Inc.*, 41 BRBS 123 (2007).

SECTION 10(d)

Sections 10(d)(2) and 8(c)(23); 1984 Amendment Retiree Provisions

The Board vacates the administrative law judge's decision based on Aduddell pursuant to the 1984 Amendments. The Board holds that the survivor of a voluntary retiree whose occupational disease manifested itself more than one year after retirement, and who died from the disease, is entitled to Section 9 death benefits based on the national average weekly wage pursuant to Section 10(d)(2). Arganbright v. Marinship Corp., 18 BRBS 281 (1986).

In a D.C. Act case decided prior to *Keener,* 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987), the remands the case for a determination of whether claimant is a voluntary retiree or not, noting that if claimant left the workforce for reasons related to his injury, the post-retirement provisions of Sections 2(10), 8(c)(23) and 10(d)(2) do not apply. *Pryor v. James McHugh Construction Co.*, 18 BRBS 273 (1986).

If the date of injury under Section 10(i) occurs more than one year after retirement, the average weekly wage is based on the national average weekly wage under Section 10(d)(2) rather than on actual wages received by the employee. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

Voluntary retirement for the purpose of calculating claimant's average weekly wage occurs when claimant leaves the workforce for reasons unrelated to his disease or disability and with no realistic expectation that he will return. Since claimant in this case became "aware" for purposes of Section 10(i) within one year of his retirement, his average weekly wage is based on his earnings during the year preceding his exit from the work force, pursuant to Section 10(c) and 10(d)(2)(A). Coughlin v. Bethlehem Steel Corp., 20 BRBS 193 (1988).

Where claimant did not suspect that a relationship existed between his hearing loss and his employment until some thirteen years after he voluntarily left the work force, his average weekly wage should be calculated pursuant to Section 10(d)(2)(B), which indicates that the calculation should be based on the national average weekly wage as of the time of injury under Section 10(i). MacLeod v. Bethlehem Steel Corp., 20 BRBS 234 (1988).

A decedent, who indicated to claimant, his widow, that he "decided to retire" at age 62, and who began receiving Social Security retirement benefits at the time, but who returned to part-time employment several months later and was subsequently diagnosed as having work-related lung cancer which ultimately lead to his death, was held to be a retiree as of the time he left his full-time job; consequently, the provisions of Section 10(d)(2) are applicable in calculating his average weekly wage. Jones v. U.S. Steel Corp., 22 BRBS 229 (1989).

The administrative law judge erred in relying on Redick, 16 BRBS 155 (1984), to deny benefits for permanent partial disability to a body part within the schedule due to claimant's failure to establish a loss of wage-earning capacity. In Redick, the claimant voluntarily withdrew from the work-force before manifestation of an occupational disease, which prior to passage of Sections 8(c)(23), 2(10), 10(d)(2) in 1984, was not compensable. The Board notes that even if Redick had not been overruled by the 1984 Amendments, it is not applicable to the instant case. Claimant sought benefits for traumatic injury arising prior to voluntary retirement, with residuals carrying over into retirement. Claimant's injury did not therefore become manifest wholly after retirement. Burson v. T. Smith & Son, Inc., 22 BRBS 124 (1989).

Administrative law judge's finding that claimant voluntarily retired is supported by substantial evidence where claimant filed for Social Security retirement benefits just prior to leaving employer but alleged no disability, his separation papers indicated voluntary retirement, claimant failed to subsequently seek any other employment, and the medical evidence does not establish a pre-retirement breathing impairment. Thus, the administrative law judge properly calculated claimant's award pursuant to Section 10(d)(2)(A) where claimant first became aware of his condition within one year of retirement. Johnson v. Ingalls Shipbuilding Div., Litton Systems, Inc., 22 BRBS 160 (1989).

The Board affirms the administrative law judge's finding that claimant left the workforce in order to receive SSA and pension benefits, reasons unrelated to his asbestosis. Since the wage-earning capacity of a voluntary retiree is irrelevant, the Board rejected claimant's argument that the administrative law judge erred in failing to consider whether employer established suitable alternate employment and that physician's recommendation that claimant avoid further exposure to asbestos caused a loss in claimant's wage-earning capacity. *Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989).

The Board rejected employer's contention that claimants must be considered involuntary retirees for purposes of their hearing loss claims because, in separate claims for asbestosis, claimant's alleged that they left the workforce due to their respiratory impairments. Since claimants did not leave the workforce due to their hearing impairments, they are voluntary retirees within the meaning of the Act for purposes of their hearing loss claims. *Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989).

The administrative law judge properly determined that the national average weekly wage in effect when decedent's occupational disease became manifest is the basis for the disability award, and that the national average weekly wage in effect when decedent died is the basis for the death award in the case of a voluntary retiree. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

In a death benefits case where the decedent voluntarily retired, the compensation rate for the award is based on the national average weekly wage in effect at the time the claimant becomes aware of the work-relatedness of the death, which can be no earlier then the date of death. It is not based on the national average weekly wage on the date of manifestation of the decedent's injury. *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT)(1st Cir. 1991).

In occupational disease cases where decedent was a voluntary retiree, claimant's award of death benefits should be based on the national average weekly wage in effect no earlier than the national average weekly wage applicable on the date of decedent's death, as claimant's date of awareness of the work-relatedness of decedent's' death could not have been earlier. In cases where decedent was an involuntary retiree, claimant's award of death benefits should be based on decedent's' actual average weekly wage at the time of injury, as Section 10(i) is inapplicable. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990)(Dolder, J., concurring in the result only).

SECTION 10(e)

For D.C. Act cases, a "minor" is a person who has not reached the age of 18. Stokes v. George Hyman Construction Co., 19 BRBS 110 (1986).

SECTION 10(f)

The Board affirms the administrative law judge's determination that claimant/widow is not entitled to Section 10(f) adjustments on her death benefits, finding Dr. Thompson's opinion sufficient to support the administrative law judge's finding that decedent's death was not causally related to his employment. Section 10(f) adjustments are only available in the case of death benefits where decedent's death is found to be causally related to his employment. Bingham v. General Dynamics Corp., 20 BRBS 198 (1988).

Board reverses administrative law judge's finding awarding Section 10(f) adjustments on claimant's permanent partial disability award. Section 10(f) only applies to awards of permanent total disability or death benefits. Allison v. Washington Society for the Blind, 20 BRBS 158 (1988), rev'd on other grounds, 919 F.2d 763 (D.C. Cir. 1990).

While the Board continues to express its disagreement with the Fifth Circuit's holding in Holliday regarding annual adjustments, it is compelled to apply the law announced in the circuit having jurisdiction. Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986), rev'd on other grounds, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991.

The Board reverses the administrative law judge's award of Section 10(f) adjustments on claimant's temporary total disability award since the language of the statute specifically applies only to awards for permanent total disability and death. Moreover, the Board holds that because the case arises in the Fifth Circuit, Holliday applies, and the compensation rate for claimant's permanent total disability award must include all intervening Section 10(f) adjustments occurring during previous periods of temporary total disability. In addition, the amended Section 10(f) provision, limiting adjustments to the lesser of the increase in NAWW or 5 percent, applies prospectively, that is, to all adjustments to which a claimant is entitled beginning on October 1, 1984. Therefore, the administrative law judge erred in finding the amended Section 10(f) limitation provision was inapplicable. Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233 (1988), aff'd, 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), rev'd, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(en banc).

Stating it was bound by the court's former decision in Holliday v. Todd Shipyards Corp., 654 F.2d 415 (5th Cir. 1981), a panel of the Fifth Circuit affirmed the Board's decision that claimant is entitled to Section 10(f) adjustments at a rate including all intervening Section 10(f) adjustments occurring during previous periods of temporary total disability. Phillips v. Marine Concrete Structures, Inc., 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), aff'g 21 BRBS 233 (1988), rev'd, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(en banc).

Upon reconsideration by the court sitting en banc, the Fifth Circuit overruled Holliday and held that Section 10(f) adjustments apply only to awards of permanent total disability. The court further holds that claimant's benefits are to be adjusted prospectively to the amount that would have been calculated absent Holliday. Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (en banc), rev'g in pert. part, 877 F.2d 1231, 22 BRBS 83 (CRT) (5th Cir. 1989).

The Board holds that since Holliday, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), was issued prior to September 30, 1981, it is binding precedent in the Eleventh Circuit and therefore its holding pertaining to Section 10(f) will be applied in that circuit despite the Board's disagreement with it. Hamilton v. Crowder Construction Co., 22 BRBS 121 (1989), aff'd sub nom. Director, OWCP v. Hamilton, 890 F.2d 1143 (11th Cir. 1989).

The Eleventh Circuit held that its ruling in the instant case was governed by the Fifth Circuit's holding in *Holliday,* 654 F.2d 415, 13 BRBS 741 (5th Cir. Unit A 1981), in which the court applied Section 10(f) to previous periods of temporary total disability where claimant was now permanently totally disabled. The court also noted the Director's acknowledgement that it must affirm the Board's decision below unless the Eleventh Circuit, *en banc*, overrules *Holliday*. Thus, the court affirmed the Board's decision without prejudice to the Director's right to petition the court for rehearing *en banc*. *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989), *aff'g Hamilton v. Crowder Construction Co.*, 22 BRBS 121 (1989).

In light of its decision in *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989), the Eleventh Circuit held that the law as set forth in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), which states that a claimant's permanent total disability rate should include all intervening Section 10(f) adjustments occurring during the previous period of temporary total disability, is the controlling law of the circuit. Therefore, the Eleventh Circuit affirmed the Board's application of *Holliday* in this case. *Southeastern Maritime Co. v. Brown*, 121 F.3d 648, 31 BRBS 140(CRT) (11th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2336 (1998).

The Board reverses award of Section 10(f) adjustments for periods of temporary total disability in this case arising in the eleventh Circuit based upon the opinion of the Fifth Circuit in *Phillips,* 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*), overruling *Holliday*. *Stanfield v. Fortis Corp.*, 23 BRBS 230 (1990).

There is no requirement that a disability be due solely to the work injury in order for Section 10(f) to apply. For purposes of Section 10(f), the term injury includes the aggravation of pre-existing non-work related conditions or the combination of work and non-work related conditions. *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

The Second Circuit determined that it would follow the Fifth Circuit's determination in *Phillips*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990), in which the court, sitting (*en banc*), overruled *Holliday.* The court thus adopted the *Phillips* interpretation of Section 10(f), which states that Section 10(f) entitles a claimant to compensation adjustments that occur only after a condition of total disability becomes permanent. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT)(2d Cir. 1990).

The Ninth Circuit held that by its terms, Section 10(f) provides only for an annual cost-of-living adjustment, effective October 1 of each year, to the compensation payable for permanent total disability. Claimants are not to receive the benefit of intervening cost-of-living adjustments occurring during the prior period of temporary disability. *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9 (CRT) (9th Cir. 1990).

The Board affirmed the administrative law judge's denial of employer's petition for modification seeking a retroactive adjustment of benefits due to the Fifth Circuit's holding in *Phillips*, limiting Section 10(f) to permanent total disability. The administrative law judge properly interpreted the *Phillips* decision as applying to cases which had not become final, unlike this case, and moreover, employer's request for modification is based on a change in law. *Ryan v. Lane & Co.*, 28 BRBS 132 (1994).

The Board affirmed the administrative law judge's finding that claimant is entitled to Section 10(f) adjustments for the period of his permanent total disability, November 14, 1988 through January 16, 1992, as the administrative law judge accepted the parties' stipulation that decedent was permanently totally disables as of November 14, 1988. Claimants are entitled to Section 10(f) adjustments to compensation during periods of permanent total disability. *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165, 168-169 (1996).

In affirming the district director’s award of death benefits, the Board held that Section 9(e)(1) does not bar the application of Section 10(f) adjustments where such adjustments to death benefits would increase compensation above the employee’s average weekly wage, as the maximum ceiling on death benefits is contained in Section 6(b)(1), which provides that compensation for disability or death benefits “shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage . . ..” The Board held that the “shall not exceed” phrase in Section 9(e)(1) is applicable only to the initial calculation of the base rate at which death benefits are payable, and does not act as a ceiling on the rate at which death benefits can be paid to a survivor. *Donovan v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 2 (1997).

The Board reverses the district director's award of a Section 14(f) assessment based on employer's failure to pay annual adjustments pursuant to Section 10(f) in accordance with *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981) as *Holliday* was overruled by the Fifth Circuit in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc)* and as the D.C. Circuit, in whose jurisdiction this case arises, stated in *Brandt v. Stidham Tire Co.,* 785 F.2d 329, 18 BRBS 73 (CRT)(D.C. Cir. 1986) that it would accept *Holliday* until it was overruled by the Fifth Circuit. Consequently, the Board disavows the holding in *Holliday* and *Brandt* in Section 10(f) cases in the D.C. Circuit and follows *Phillips*. *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998).

The D.C. Circuit held that the Board does not have jurisdiction to address a supplementary compensation order declaring payments in default issued pursuant to Section 18(a) of the Act. Specifically, in this case, the OWCP issued a supplementary compensation order finding employer/carrier in violation for failure to make payments of benefits pursuant to *Brandt/Holliday*, and it awarded claimant a Section 14(f) penalty of 20% of the shortfall. Because employer/carrier raised the issue of whether claimant's benefits were subject to cost-of-living adjustments under Section 10(f) pursuant to *Brandt/Holliday*, and because this issue had not been addressed previously, the Board took the position that the Section 10(f) payments were not the subject of a compensation order and were properly before it for the first time; following *Bailey*, 32 BRBS 76 (1998), the Board held that prospective benefits are not subject to Section 10(f) adjustments. The court vacated the Board's order, holding that employer did not timely challenge the Section 10(f) issue, and that the Board lacks jurisdiction to address issues raised in a default order. The court thus declines to address the merits of the Section 10(f) issue. *Snowden v. Director, OWCP*, 253 F.3d 725, 35 BRBS 81(CRT) (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 1988 (2002).

The Board holds that the administrative law judge erred in applying the district director's method of computing the amount of benefits to which claimant is entitled under the commutation provision of Section 9(g), in light of Section 10(f), the application of which is mandatory to an award of death benefits. The discount rate applied by the district director accounts for the present value of the lump sum payable, but it can be applied only after Section 10(f) adjustments are taken into account in determining the lump sum. The rejection of Section 10(f) based on the difficulty in ascertaining the value of future increases in the national average weekly wage is not a valid reason for not applying Section 10(f). It is not reasonable to assume that no increases will occur, although Section 9(g) provides the district director with discretion as to the value of the future Section 10(f) adjustments. Thus, the case is remanded so that Section 10(f) adjustments may be included in the calculation of claimant's commuted death benefits. *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001).

Where the second employer or carrier is entitled to a credit if claimant's concurrent permanent partial and permanent total disability awards exceed the maximum allowable compensation under Section 8(a), but as a result claimant's permanent total disability award may be reduced by loss of full benefit of Section 10(f) adjustment, claimant is entitled to receive the full amount of the Section 10(f) adjustment on his permanent total disability award in calculating the amount then subject to the credit for the initial permanent partial disability award, pursuant to *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995). *Price v. Stevedoring Services of America,* 36 BRBS 56 (2002), *aff'd, vacated and remanded, and rev'd on other grounds,* 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004) and No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), *cert. denied,* 125 S.Ct. 1724 (2005).

In this D.C. Act, and therefore pre-1984 Amendment, case, the Board holds that Section 9(e) does not limit the maximum compensation payments to the amount of the decedent's average weekly wage. Rather, this maximum applies to the initial computation of death benefits. Thereafter, due to application of Section 10(f) adjustments, the payments of death benefits may exceed the decedent's average weekly wage as to hold otherwise would nullify Section 10(f) which applies to awards of death benefits. The Board follows *Donovan,* 31 BRBS 2 (1997) in the pre-1984 context. *Weeks v. U.S. Elevator Corp.*, 39 BRBS 25 (2005).

SECTION 10(h)

The Board notes that Section 10(h) is not applicable as the injury in this case occurred after the 1972 Amendments. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

The parties' stipulation that the injury occurred in 1968, thereby making Section 10(h) applicable to the claim, is vacated in light of the 1984 Amendments that govern when an injury occurs in an occupational disease case, and because the stipulation bound the Special Fund without its participation. *Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987).

Section 10(h)(1)

The court affirmed the Board's holding that Section 10(h) applies to claims in which the employee was injured prior to the date of enactment of the 1972 Amendments but died after that date. Director, OWCP v. Detroit Harbor Terminals, Inc., 850 F.2d 283, 21 BRBS 85 (CRT)(6th Cir. 1988), aff'g Dennis v. Detroit Harbor Terminals, 18 BRBS 250 (1986).

The Board followed its decision in Dennis, 18 BRBS 250 (1986), and the Sixth Circuit's affirmance of that decision in Director, OWCP v. Detroit Harbor Terminals, Inc., 850 F.2d 283, 21 BRBS 85 (CRT) (6th Cir. 1988), and held that Section 10(h) applies where a post-1972 Amendment death follows a pre-1972-Amendment injury. Fox v. Pacific Ship Repair, 21 BRBS 171 (1988).

The First Circuit reversed the Board's determination, pursuant to *Dennis*, 18 BRBS 250 (1986), *aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 21 BRBS 85 (CRT) (6th Cir. 1988), that Section 10(h) applies where a post-1972 amendment death follows a pre-1972 amendment injury. The court held that because death benefits for a post-1972 death are calculated at the more generous post-1972 rates, *see* 33 U.S.C. §909(e)(1982) (amended 1984), it is unnecessary for the "gap-closing" provision of Section 10(h)(1) to apply. *Director, OWCP v. Bath Iron Works [Lebel]*, 885 F.2d 983, 22 BRBS 131 (CRT) (1st Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990).

Section 10(h) increases only apply to compensation for permanent total disability or death, not temporary total disability. Nooner v. National Steel & Shipbuilding Co., 19 BRBS 43 (1986).

The Board reversed the administrative law judge's finding that the Special Fund was liable for annual adjustments to claimant's benefits pursuant to Section 10(h) because under Section 10(i), as amended in 1984, the time of "injury" occurred in 1982, although the employee's death occurred in 1965. The Board held that since the time of injury occurred after 1972, Section 10(h) does not apply and employer, rather than the Special Fund, is liable for annual adjustments under Section 10(f). Taddeo v. Bethlehem Steel Corp., 22 BRBS 52 (1989).

Section 10(h)(2)

Although the Act does not specifically provide for interest on overdue benefits, case law provides for such interest assessments against the Special Fund in Section 8(f) cases. The Board will apply the rationale of those 8(f) cases to the Special Fund's liability under Section 10(h)(2) of the Act. Note that this rationale does not apply to the portion of 10(h) payments owed by general appropriations. The Special Fund can be held liable for interest on its portion of overdue Section 10(h) payments. Evangelista v. Bethlehem Steel Corp., 19 BRBS 174 (1986).

SECTION 10(i)

NOTE: Cases involving hearing loss are digested in a new subsection at the end of this section.

Neither present nor retroactive application of the voluntary retiree provisions enacted by the 1984 Amendments violates the Due Process Clause of the 5th Amendment of the U.S. Constitution. Shaw v. Bath Iron Works Corp., 22 BRBS 73 (1989).

The Board vacates the deputy commissioner's computation of decedent's average weekly wage as of the date of last exposure and remands for consideration under Section 10(i), which defines "injury" in an occupational disease case as the time the disease becomes manifest. Sans v. Todd Shipyards Corp., 19 BRBS 24 (1986).

The Board remands the case for consideration of average weekly wage consistent with the 1984 Amendments, noting that under 10(i) the date of injury for average weekly wage purposes in an occupational disease case is the date of awareness. The parties' specific contentions are not addressed. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

The Board vacates the award based on the parties' stipulations and remands the case for findings pursuant to the 1984 Amendments. If the date of injury under Section 10(i) occurred after retirement, and claimant left the workforce for reasons unrelated to his injury, disability is based on the degree of permanent impairment and economic factors are not considered. *Truitt v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 79 (1987).

The date the parties stipulated that claimant learned that his condition is work-related is the time of injury under Section 10(i). Inasmuch as this date occurred after retirement, claimant is limited to an award based on permanent impairment under the AMA *Guides*. *Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1987).

The Board held that the administrative law judge erred in failing to apply Section 10, as amended in 1984, to a claim for death benefits where the employee's death occurred in 1965, but his widow did not become aware of the relationship between his longshore employment and death until 1982, at which time she filed a claim. As the claim was pending on the effective date of the 1984 Amendments, Section 10(i) applied in defining time of injury. Taddeo v. Bethlehem Steel Corp., 22 BRBS 52 (1989).

The post-retirement provisions of Sections 2(10), 8(c)(23, 10(d)(2), and 10(i), do not apply to claimants whose occupational disease causes their involuntary retirement from the workforce. Under Section 10(i) in disability claims involving voluntary retirees falling within Section 8(c)(23), the time of injury is determined by the date the employee becomes aware of the work-related disability; however, in a Section 9 claim for death benefits, where the decedent was a voluntary retiree, the time of injury is determined by the date the claimant is aware of the work-related death. Accordingly, the time of injury in the latter instance cannot be prior to the employee's date of death, and the average weekly wage at the time of death is used. In a footnote, the Board notes that its statutory construction of Section 10(i) is limited to cases involving death benefits claims from survivors of voluntary retirees. In cases of death benefits claims from survivors of involuntary retirees, death benefits are based on the average weekly wage of the employee at the time of injury, as §10(d)(2) would not apply in such cases. Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989).

In a death benefits case where the decedent voluntarily retired, the compensation rate for the award is based on the national average weekly wage in effect at the time the claimant becomes aware under Section 10(i) of the work-relatedness of the death, which can be no earlier then the date of death. It is not based on the national average weekly wage on the date of manifestation of the decedent's injury. *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT)(1st Cir. 1991).

The court reversed the Board's holding that in cases where disability from an occupational disease predates awareness of the relationship between disability and employment, the average weekly wage should reflect earnings prior to the onset of disability rather than the subsequent earnings at the later time of awareness. While noting that use of Section 10(i) could produce anomalous results in some situations (for example, where claimant becomes disabled before suffering a wage loss attributable to his disease and recognizes the occupational nature of his disease only after retirement or accepting a lower-paying job), application of Section 10(i) on facts of this case does not produce an unjust result of contravene the statute's compensatory purpose. Claimant was earning more at the date of awareness under Section 10(i). However, in a footnote addressing permanent partial disability computations, the court noted that Section 10(i) should not be used as the difference between pre-awareness and post-awareness wages in most cases will be too small to adequately compensate an employee. LaFaille v. Benefits Review Board, 884 F.2d 54, 22 BRBS 108 (CRT)(2d Cir. 1989), rev'g Lafaille v. General Dynamics Corp., 18 BRBS 88 (1986).

In occupational disease case where decedent was a voluntary retiree, claimant's award of death benefits should be based on the national average weekly wage in effect no earlier than that applicable on the date of decedent's death, as claimant's date of awareness of the work-relatedness of decedent's death could have been no earlier. In cases where decedent was an involuntary retiree, claimant's award of death benefits should be based on decedent's actual average weekly wage at the time of injury, as Section 10(i) is inapplicable. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990)(Dolder, J., concurring in the result).

The Board held that, although this case arises under the D.C. Act and the 1984 Amendments to the Longshore Act are not applicable, the administrative law judge properly determined that claimants are entitled to death benefits based on decedent's average weekly wage as of the year before his death. Long-standing precedent provides that the "time of injury" in an occupational disease case is the date on which the disability becomes manifest; thus, the "time of injury" for determining average weekly wage is the date on which the occupational disease becomes manifest through a loss of wage-earning capacity. As decedent was diagnosed with chronic active hepatitis in 1977 but continued working until his occupational disease hospitalized him and then caused his death 1992, it is consistent with case law to base his average weekly wage on the wages earned in the year preceding his death, and this compensates claimants for the full extent of decedent's wage loss. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

Claimant's back condition, degenerative facet disease, resulting from a fall from a ship ladder, was a traumatic injury, not an occupational disease, and compensation benefits should be based on claimant's average weekly wage at the time of the 1987 injury, *i.e.*, the date the incident occurred, rather than the higher average weekly wage at the time the condition was diagnosed in 1992. Degenerative facet disease resulted from traumatic physical impact, not exposure to external, environmentally hazardous conditions of employment. The Fifth Circuit expresses its disagreement with the Ninth Circuit's application of concept of latent trauma in non-occupational disease case in *Johnson v. Director, OWCP,* 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied,* 499 U.S. 959 (1991). *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997).

The First Circuit affirmed the administrative law judge's finding that under Section 10(i), claimant's time of injury with regard to his carpal tunnel syndrome was the date he first complained to employer of tingling in his hands and was put on light duty, not the subsequent date when claimant was laid off from a management position and was unable to return to his former job because of his injury. *Leathers v. Bath Iron Works & Birmingham Fire Ins.*, 135 F.3d 78, 32 BRBS 169 (CRT)(1st Cir. 1998).

The Ninth Circuit rejects the Director's argument that claimant's disabling back condition, which is a natural and unavoidable progression of his work-related knee injury, qualifies as an occupational disease. The court accepts the definition of "occupational disease" set forth in *Gencarelle,* 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989), as "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." As claimant's back problems arose from walking on his injured knee, and not from any conditions or activities particular to his longshore job, his back condition does not represent an occupational disease and, thus, the provisions of Section 10(i) governing the time of injury in an occupational disease case for purposes of average weekly wage do not apply. *Port of Portland v. Director, OWCP [Ronne],* 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1718 (2000).

Section 10(i) and hearing loss

NOTE: Cases decided before *Bath Iron Works* are of historical significance only.

The Supreme Court holds that hearing loss is not an occupational disease which "does not immediately result in ... disability," and thus Section 10(i) is inapplicable. The Court holds that a hearing loss injury occurs simultaneously with exposure to excessive noise, and therefore the injury is complete on the date of last exposure. Average weekly wage is thus calculated from the date of last exposure. Inasmuch as Section 10(i) is inapplicable, Sections 10(d)(2) and 8(c)(23) also are inapplicable and all hearing loss is to be compensated pursuant to Section 8(c)(13). *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), *aff'g* 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991).

The First Circuit holds that benefits for voluntary retirees with hearing loss are to be calculated pursuant to Section 8(c)(13), rejecting the position taken by the Fifth Circuit in *Fairley*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), that benefits are to be calculated under Section 8(c)(23). The court reasoned that unlike asbestosis, a disease with symptoms that often do not appear until after retirement, hearing loss symptoms occur before retirement, whether or not they are noticed by the worker, and thus, the "time of injury" is prior to retirement, rendering Section 10(i) and the post-retirement injury provisions inapplicable. The court [wrongly] concluded that its holding "has no significance beyond this case." *Bath Iron Works v. Director, OWCP*, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), *rev'g Brown v. Bath Iron Works Corp.*, 24 BRBS 89 (1990)(*en banc*)(Stage, C.J,. concurring in the result)(Brown, J., dissenting on other grounds)(McGranery, J., dissenting), *aff'd*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993).

For the reasons stated in *Machado*, 22 BRBS 176 (1989) and *Fairley*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), the Board reasserts the applicability of Section 10(i) in retiree hearing loss cases. *Brown v. Bath Iron Works Corp.*, 24 BRBS 89 (1990)(*en banc*) (Stage, C.J,. concurring in the result)(Brown, J., dissenting on other grounds)(McGranery, J., dissenting), *rev'd sub nom. Bath Iron Works v. Director, OWCP*, 942 F.2d 811, 25 BRBS 30 (CRT)(1st Cir. 1991), *aff'd*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993).

The Board affirms the administrative law judge's hearing loss award based on claimant's average weekly wage on the date an audiogram was administered indicating the full extent of his disability for which he filed this claim, applying Section 10(i). Epps v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 1 (1986)(Brown, J., concurring).

Board reaffirms notion that where, as here, a claimant's hearing loss results from prolonged on-the-job exposure to noise, the hearing loss constitutes an occupational disease under the Act. Board accordingly holds that, since claimant suffers from an occupational disease, Section 10(i) should have been applied in determining when claimant's injury "occurred" for purposes of determining average weekly wage. MacLeod v. Bethlehem Steel Corp., 20 BRBS 234 (1988).

The Board rejects carrier's contention that the "date of injury" for the computation of claimant's average weekly wage occurred several years before the date on which claimant received an audiogram showing a hearing loss and had knowledge of the causal connection between his hearing impairment and his employment. Section 10(i) applies in hearing loss claims. Since the administrative law judge properly concluded that claimant's stipulated January 1983 wage rate was the same as that on his awareness date under Section 10(i) in March 1983, the administrative law judge's determination was affirmed. Grace v. Bath Iron Works Corp., 21 BRBS 244 (1988).

The Board rejects the Director's argument that hearing loss is not an occupational disease which does not immediately result in disability and thus that Section 10(i) does not apply. Average weekly wage is calculated pursuant to Section 10(i) in hearing loss cases. The Board notes the problems that could arise if the date of last exposure is used as the time of injury. Machado v. General Dynamics Corp., 22 BRBS 176 (1989)(en banc)(Brown, J., concurring).

The Fifth Circuit affirms the Board's reasoning that Section 10(i) applies in retiree hearing loss cases, finding no congressional intent to treat hearing loss any different than other occupational diseases although the court acknowledges that hearing loss does not progress after the death of last exposure. The court reverses the Board's holding that claimants are entitled to compensation under Section 8(c)(13), and holds that they are entitled to compensation under Section 8(c)(23) pursuant to the 1984 Amendments. It remanded the case for the Board to make the appropriate adjustments under the retiree scheme embodied in Sections 8(c)(23), 10(d)(2), 10(i), and 2(10). *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *rev'g in part and aff'g in part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (*en banc*) (Brown, J., concurring), and *Gulley v. Ingalls Shipbuilding, Inc.,* 22 BRBS 262 (1989) (*en banc*) (Brown, J., concurring).

The Board relies on *Machado*, 22 BRBS 179 (1989), for the propositions that under Section 10(i) the time of injury for the occupational disease of hearing loss is the date claimant becomes aware of the relationship between his employment, disease and disability, and that benefits for voluntary retirees who suffer from hearing loss should be calculated under Section 8(c)(13). *Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting on other grounds).

The Eleventh Circuit holds that Section 10(i) is applicable to hearing loss claims inasmuch as the legislative history of the 1984 Amendments does not reflect congressional intent to treat hearing loss differently than other occupational diseases. The court notes that the conference report specifically rejects the date of last exposure for purposes of determining average weekly wage, and the court rejects the Director's attempt to distinguish hearing loss as being a completed injury at the time of last exposure. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229 (CRT) (11th Cir. 1991).

In this hearing loss case, the date of injury for the purpose of determining claimant's average weekly wage was the date of awareness, which was the date when claimant received an audiogram and a medical report specifically linking his hearing loss to his employment. *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991).

The Board held that consistent with *Port of Portland*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), for purposes of determining average weekly wage in occupational hearing loss cases arising in the Ninth Circuit, the date of injury under Section 10(i) is the date that the employee was or should have been aware of the relationship between the employment, the disease and disability demonstrated on the determinative audiogram. *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991).

In light of *Bath Iron Works* and *Port of Portland*, the Ninth Circuit endorsed the Board's rule in *Mauk,* 25 BRBS 118 (1991) that, for occupational hearing loss claims, the date of the last exposure to injurious noise prior to the determinative audiogram is the date of injury for purposes of calculating average weekly wage. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

The Board states it will continue to apply Section 10(i) to hearing loss cases consistent with *Machado*, *Fairley*, and *Sowell*, noting the contrary decision of the First Circuit in *Brown*. The Board notes that hearing loss injuries have consistently been treated the same as other occupational diseases, and that Congress specifically rejected the date of last exposure approach in enacting the 1984 Amendments. The Board further notes that the First Circuit erroneously believed that its pronouncement on the inapplicability of Section 10(i) would not have far reaching effects. *Harms v. Stevedoring Service of America*, 25 BRBS 375 (1992) (Smith, J., dissenting on other grounds), *rev'd in pert. part mem.,* 17 F.3d 396 (9th Cir. 1994).